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IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1906

UNITED STATES OF AMERICA,
COMPLAINANT,
v.
THE STATE OF MICHIGAN,
DEFENDANT.
} Equity. Original, No. 12 AL 40

ON DEMURRER.

BRIEF FOR DEFENDANT.

IN THE SUPREME COURT OF THE UNITED STATES.

IN EQUITY. ORIGINAL No. 13.

October Term, 1902.

UNITED STATES OF AMERICA,
Complainant,

vs.

THE STATE OF MICHIGAN,
Defendant.

ON DEMURRER.

Brief for Defendant.

Statement.

In the complainant's bill of complaint two acts of Congress and six acts of the Legislature of the State of Michigan are referred to, as follows, viz.:

ACTS OF CONGRESS.

1. An act approved August 26, 1852, entitled "An Act granting to the State of Michigan the right of way and a donation of public lands for the construction of a ship canal around the Falls of St. Mary's in said State."

2. An act approved June 14, 1880, entitled "An Act making appropriations for the construction, repair, completion and preservation of certain works on rivers and harbors, and for other purposes."

ACTS OF THE LEGISLATURE OF MICHIGAN.

1. Act No. 38, Laws of Michigan 1853, entitled "An Act to provide for the construction of a ship canal around the Falls of St. Mary."

2. Act No. 91, Laws of Michigan 1885, entitled "An Act to provide for the collection of tolls, and for the care, charge and operation of the St. Mary's Falls Ship Canal."

3. Act No. 175, Laws of Michigan 1859, entitled "An Act to provide for the repairing, preservation, and operation of the ship canal around the Falls of St. Mary, and to perform the trust respecting the same."

4. Joint Resolution No. 39, Laws of Michigan 1869, entitled "Joint Resolution authorizing the Board of Control of the St. Mary's Falls ship canal to transfer said canal to the United States."

5. Act No. 17, Public Acts 1881, entitled "An Act to authorize the Board of Control to transfer the St. Mary's Falls ship canal, with the property belonging to the same, to the United States."

6. Joint Resolution No. 20, Public Acts 1897, entitled "Joint Resolution to provide for the transfer of certain funds to the general fund."

Counsel for complainant have printed some of these acts in their entirety, but have only made excerpts from or stated certain of the provisions of the balance.

While counsel for defendant admits to the fullest extent that by his demurrer he has, so far as this hearing is concerned, accepted as true the statement contained in complainant's bill, yet he considers that it is no deviation from the rule, to print in this brief two of the acts above referred to upon which complainant's bill is based and which are incompletely set forth therein, in order that this court may

be conveniently provided with certain of the facts which should properly be considered on this hearing. The first is as follows:

ACT No. 17, PUBLIC ACTS 1881.

"An act to authorize the board of control to transfer the Saint Mary's Falls ship canal, with the property belonging to the same, to the United States.

Whereas, Congress at its last session included in the river and harbor bill the following:

For improving and operating the Saint Mary's river and Saint Mary's Falls canal, two hundred and fifty thousand dollars. "And the Secretary of War is hereby authorized to accept on behalf of the United States from the State of Michigan the Saint Mary's canal and the public works thereon: Provided, Such transfer shall be so made as to leave the United States free from any and all debts, claims or liability of any character whatsoever, and said canal after such transfer shall be free for public use: And provided further, That after such transfer the Secretary of War be and hereby is authorized to draw from time to time his warrant on the Secretary of the Treasury to pay the actual expenses of operating and keeping said canal in repair;" therefore,

SECTION 1. *The People of the State of Michigan enact,* That the board of control of the Saint Mary's Falls ship canal be and hereby is authorized and directed to transfer the said canal and the public works thereon, with all its appurtenances and all the right and title of the State of Michigan in and to the same, to the United States in accordance with (the) provisions of the above mentioned clause: Provided, That this cession is upon the express con-

dition that the State of Michigan shall so far retain concurrent jurisdiction with the United States over the Saint Mary's Falls ship canal, and in and over all lands acquired or hereafter acquired for its use; that any civil or criminal process issued by any court of competent jurisdiction, or officers having authority of law to issue such process, and all orders made by such court, or any judicial officer duly empowered to make such orders, and necessary to be served upon any such person, may be executed upon said Saint Mary's Falls ship canal, its lands, and in the buildings that may be erected thereon, in the same way and manner as if jurisdiction had not been ceded as aforesaid.

SEC. 2. The board of control of the Saint Mary's Falls ship canal are hereby authorized and empowered, at any time when they may deem it proper, to transfer all material belonging to said canal, and to pay over to the United States all moneys remaining in the canal fund, excepting so much as may be necessary to put the said canal in repair for its acceptance in accordance with the act above recited: Provided, Such transfer of material and payment of moneys shall be in consideration of the construction, by the United States, of a suitable dry dock, to be operated in connection with the Saint Mary's Falls ship canal for the use of disabled vessels.

This act is ordered to take immediate effect.

Approved March 3, 1881."

The second is the Joint Resolution of 1869, and is as follows:

JOINT RESOLUTION No. 39, LAWS OF MICHIGAN 1869.

"Joint Resolution authorizing the board of control of the St. Mary's Falls ship canal to transfer said canal to the United States.

Whereas. The immediate enlargement of the St. Mary's Falls canal by which Lake Superior is rendered accessible to vessels, is a work of urgent necessity and national importance;

And Whereas, The State of Michigan has no funds properly applicable to such purpose;

Resolved by the Senate and House of Representatives of the State of Michigan, That the board of control of the St. Mary's Falls ship canal be, and it is hereby authorized and directed to transfer the said canal, with all its appurtenances, and all the right and title of the State of Michigan in and to the same, to the United States: Provided, This State shall be first guaranteed and secured to the satisfaction of said board of control, against loss, by reason of its liability upon the bonds issued under and by authority of an act, entitled 'An Act to provide for the repairing, preservation and operation of the ship canal around the Falls of St. Mary, and to perform the trust respecting the same,' approved February fourteenth, eighteen hundred and fifty-nine.

Approved April 3, 1869."

With this premise, the facts of this case can be stated briefly but comprehensively as follows:

1. By act of Congress approved August 26, 1852, the United States made a grant to the State of Michigan of a right of way for a ship canal around the rapids or falls of the St. Mary's River and of 750.000 acres of public lands to

aid the State in its construction, subject to the conditions and terms expressed in the act.

2. By Act No. 38, Laws of Michigan 1853, this grant was accepted and the conditions thereof agreed to and made obligatory upon the State, and the construction of the canal was ordered.

3. By Act No. 91, Laws of Michigan 1855, the Legislature made provisions for the care, charge and operation of the completed canal, the collection of tolls, etc.

4. The canal was operated and tolls collected from 1855 to 1881, but no annual reports were rendered to the Secretary of the Interior as provided for in the Act of August 26, 1852.

5. By Joint Resolution No. 39, Laws of Michigan 1869, the Legislature offered to transfer the canal and its appurtenances to the United States, provided the State was guaranteed from loss on account of bonds that it had issued in 1859 to make needed repairs upon the canal and which were in part outstanding, and for the payment of which the canal tolls and the full faith and credit of the State was pledged.

6. By the Act of Congress approved June 14, 1880, the Secretary of War was authorized to accept on behalf of the United States from the State of Michigan, the St. Mary's canal and the public works thereon: Provided. Such transfer should be made so as to leave the United States free from any and all debts, claims or liability of any character whatsoever; said canal after such transfer to be free for public use.

7. By Act No. 17, Public Acts of Michigan 1881, the board of control of the St. Mary's Falls ship canal was authorized and directed,

First. "To transfer the said canal and the public works thereon, with all its appurtenances and all the right and title of the State of Michigan in and to the same to the United States," in accordance with the provisions of the Act of Congress approved June 14, 1880; and

Second. "At any time when they may deem it proper, *to transfer all material belonging to said canal, and to pay over to the United States all moneys remaining in the canal fund* excepting so much as may be necessary to put the said canal in repair for its acceptance in accordance with the act above recited: Provided, *Such transfer of material and payment of moneys* shall be in consideration of the construction, by the United States, of a suitable dry dock, to be operated in connection with the St. Mary's Falls ship canal for the use of disabled vessels."

8. At the time the transfer was made there was a large amount of money realized from tolls and earnings of this canal in the treasury of the State to the credit of the "Canal Fund," and in 1883 the balance was $68,927.12.

9. It is not alleged in complainant's bill of complaint that a dry dock was ever constructed by the United States or operated in connection with its canal.

10. By Joint Resolution No. 20, Public Acts 1897, the balance held in the "canal fund" was transferred to the "general fund" of the State, and the board of control of the St. Mary's Falls ship canal was authorized to dispose of the tools and machinery referred to in Act No. 17, Public Acts 1881 and deposit the money received therefrom in the general fund.

11. The State has refused to turn this money over to the United States upon demand of the Attorney General.

The action that has been brought by the United States is primarily and solely an effort *to enforce a money demand*, in which the claim is made that the United States is entitled to have and receive from the State of Michigan,

First. The $68,927.12 which was in the treasury of the State to the credit of the St. Mary's Falls ship canal fund at the time the canal was turned over to the general government and which had accrued from the net receipts derived from canal tolls, etc., and

Second. The proceeds from the sale of all material, tools and personal property appertaining to said canal and on hand when it was turned over; and

Third. The entire amount realized by the State from the sale of the lands granted to aid in the construction of the canal and the entire earnings thereof, less only such proper disbursements and expenditures as the State was entitled to be reimbursed for and to retain, under the provisions of the Act of August 26, 1852; it being the theory of the complainant that, inasmuch as the State had wholly failed to report to the Secretary of the Interior as required under said act, the United States is entitled to have a full accounting and a decree for the balance found on such accounting to be due and owing by the State.

It is not conceivable that the department of justice has invoked the jurisdiction of this court merely to have supplied to the Department of the Interior for mere historical or statistical purposes the data regarding the construction and operation of this canal which it charges the officers of the State with having failed to report. For even though unreported to the Secretary of the Interior, the records of this canal, its earnings, its rates of toll, the expenses of its operation, repair, improvement and maintenance for each year of its operation by the State of Michigan fully appear

in the printed documents of the State; and the information regarding its construction and the application of the land grant and everything else that is sought to be inquired into is a matter of complete record in the proper departments of the State. The information to be found in these printed documents and records is accessible to the officers of the government and would no doubt be furnished on request if it were deemed desirable that they be made a part of the files of the office of the Secretary of the Interior.

But it is not on account of the failure of the officers of the State to make an annual report to the Secretary of the Interior that this suit is brought, but because the Department of Justice deems it incumbent upon it to assert and enforce what it esteems to be the right of the United States to have and receive from the State everything that the latter has received by the way of tolls, sales of land, receipts from other sources appertaining to the operation of the canal over and above its lawful disbursements for constructing, operating and repairing the same.

The theory of the Department of Justice is that the State had no beneficial interest in the canal and the lands granted for its construction, that it was in effect a trustee for the United States, and that it is bound to account to the latter for any *profits* that may have accrued from its trust estate.

The State, on the contrary, by the demurrer it interposes, denies that its relation to the United States was that of a trustee.

It denies that the United States can be considered as the *cestui que trust* to whom it is accountable for the balance of its canal fund or for any moneys that should rightfully have been there.

It asserts that its title to the canal and to the lands granted to aid in its construction became absolute, uncon-

ditional and indefeasible upon its acceptance of the grant and the completion of the canal, and that by right of such ownership to it belongs any incidental pecuniary benefits or earnings that may have arisen from its operation of the canal.

ARGUMENT.

I.

BY ITS ACCEPTANCE OF THE ACT OF AUGUST 26, 1852, AN ABSOLUTE AND INDEFEASIBLE TITLE IN FEE TO THE EASEMENT OR RIGHT OF WAY FOR THE PROPOSED SHIP CANAL WAS VESTED IN THE STATE OF MICHIGAN.

First. *The "words of grant" found in the act are such as are commonly employed to vest a fee title and a beneficial interest in the grantee.*

The essential words of conveyance or grant of the canal right of way will be found in the first section of the act, and are as follows:

"The same is hereby *granted* to be used by said State, or under the auhority thereof, for the construction and convenience of such canal, and the appurtenances thereto and the use thereof is *hereby vested in said State* FOREVER."

That these words are such as are ordinarily used by Congress to vest in grantees a fee title, cannot be disputed.

In the case mainly relied upon by counsel for complainant, viz., Rice vs. Railroad Company, 1 Black, 358, this court had under consideration an Act of Congress approved June 29, 1854, entitled "An Act to aid the Territory of Minnesota in the construction of a railroad therein." The words of grant in that act were as follows:

"That there be, and is hereby *granted*" without other words than the designation of the lands to which the grant was intended to apply; and in the fourth section of the act was the express proviso that "*No title shall vest* in the said Territory of Minnesota, nor shall any patent issue * * * *until* a continuous length of *twenty miles of said road shall be completed.*"

Construing the words employed in connection with the proviso, Justice Clifford says on page 378:

> "*Undoubtedly the words employed are sufficient to have that effect;* (viz., the effect of absolutely vesting in the Territory a beneficial interest in the property granted) and, *if not limited or restricted by the context or other parts of the act* they would probably receive that construction."

He also says on the same page that the word "grant" "if used broadly, without limitation or restriction would carry an estate or interest in the thing granted;" and were it not that he found in the clause "no title shall vest until twenty miles of road shall be completed," a condition precedent to the vesting of title, he would probably have sustained the grant as irrevocable. Justice Nelson in a dissenting opinion in the same case holds that it was irrevocable regardless of the condition. He says:

> "This is a conditional grant, the condition particularly specified in the fourth section. The condition is, the construction of twenty miles of the road, when one hundred and twenty sections are to be conveyed, and so on. The idea seems to be that a conditional grant of this description may be revoked, *but not one absolute in its terms.* I am not aware of any such distinction. Certainly none is to be found. At com-

> mon law or in equity a conditional grant is just as obligatory and indefeasible between the parties as one that is absolute. The grant carries with it not only the right, but the obligation, of the grantee to fulfill the condition; and until the failure to fulfill, the obligation is complete and the grant irrevocable."

There is substantial concurrence in these opposing opinions that the grant there under consideration did not lack of words implying the vesting of an absolute estate of interest. The revocability arose chiefly from the condition precedent to the vesting of title expressed in the act.

But in the grant now under consideration there are no "conditions precedent" expressed. Note also the more weighty character of the words of grant. The right of way is not only *granted*, but is *vested forever* in the State.

It will not be contended but that the owner of an unconditional fee estate has a beneficial interest in the property thus held, and that when a grantor conveys to a grantee such an estate it is presumptively intended to vest in the grantee a beneficial interest; and unless there are conditions expressed in the grant expressly negativing the vesting of such an interest, or unless the title held or conveyed is granted for the purpose of establishing a trust or a mere power, a beneficial interest in, and the absolute ownership of, the returns from the use of the property by its owner is bound to be held to exist.

Second. *The limitations upon the use of the canal imposed by the act in question cannot be considered as "conditions subsequent" intended to operate in possible impairment of an otherwise indefeasible title but as covenants of the grantee enforceable only through actions in that behalf and not by forfeiture or defeasance of the estate granted.*

There are six provisos, conditions or limitations attached to this grant, viz.:

The *first* is the limitation of the use to which the easement granted may be put. It is limited to canal purposes.

The *second* relates to the identification of the property granted, and gives the State the alternative of locating its canal on the line of a previous survey, or selecting such other route as might be approved by the Secretary of War, the language of the proviso being as follows:

> "Provided, That in locating the line of said canal through said military reservation the same shall be located on the line of the survey heretofore made for that purpose, or such other route between the waters above and below said Falls, as, under the approval of the Secretary of War, may be selected."

The *third* relates to the action of the State in the construction of the canal, and requires the canal to be of certain dimensions, the language used being as follows:

> "And provided further, That said canal shall be at least one hundred feet wide. with a depth of water twelve feet, and the locks shall be at least two hundred and fifty feet long and sixty feet wide."

The *fourth* relates to the future operation of the canal, and requires as follows:

> "And the said canal shall be and remain a public highway for the use of the Government of the United States, free from toll or other charge upon the vessels of said Government engaged in the public service, or upon vessels employed by said Government in the transportation of any property or troops of the United States."

The *fifth* also relates to the future operation of the canal, and the tolls that might be collected for the use thereof. This provision is more intimately associated with the grant of land to aid in the construction of the canal than the grant of the right of way, but it is none the less expressed as a limitation upon the authority of the State to impose tolls. Until the State was reimbursed for its expenditures in the construction of the canal it could charge such rates of toll as it chose. But after it was fully reimbursed it was to be allowed to tax for the use of said canal *only such tolls as should be sufficient to pay all necessary expenses for the care, charge and repairs thereof.* (See section 5.)

The *sixth* relates to the report required to be made to the Secretary of the Interior, and is as follows:

> "The Legislature of said State shall cause to be kept an accurate account of the sales and net proceeds of the lands hereby granted and of all expenditures in the construction, repairs and operating of said canal and of the earnings thereof, and shall return a statement of the same annually to the Secretary of the Interior."

The theory of the Department of Justice is that it was manifestly the design of Congress not to grant to the State of Michigan, as respects this particular canal, what had been given to Illinois, Indiana, Ohio, and perhaps some of the other States; namely, grants of land to aid in the construction of canals *that were designed for possible profit* to the State through the income to be derived therefrom.

> See "An act to grant a quantity of land to the State of Illinois, for the purpose of aiding in opening a canal to connect the waters of the Illinois River with

those of Lake Michigan," approved March 2, 1827; also

"An act to grant a certain quantity of land to the State of Indiana. for the purpose of aiding said State in opening a canal to connect the waters of the Wabash River with those of Lake Erie," approved March 2, 1827.

In each of these acts there are no restrictions upon the tolls that the states may charge for the use of their respective canals, the only limitation imposed being that Government vessels should be passed free of tolls; and it is argued on behalf of the United States, that, by reason of this distinctive clause in the act under consideration by which the State of Michigan was inhibited from operating the canal for its own pecuniary profit or benefit, it is evident that Michigan acquired no such beneficial interest in this grant as did Indiana and Illinois in theirs.

Let us consider the operation and bearing of the first, fourth, fifth and sixth conditions, the second and third having no possible bearing upon the controversy.

Is it claimed on behalf of the United States that a failure on the part of the State to pass its vessels through the canal without toll or charge would have entitled it to revoke the title of the State?

Certainly this right of free toll which the United States reserves to itself is not expressed as a condition in possible impairment of the absolute estate previously granted.

Washburn on Real Property uses the following language:

"But it is said, 'if one makes a feoffment in fee, *ea intentione, ad effectum*, etc., that the feoffor shall do or not do such an act, these words do not make the estate conditional, but *it is absolute notwithstanding.* And yet where the grant is to a public or charitable

use and is expressed to be for a specific or limited purpose, the land cannot be appropriated to any other. If it is, the grantor retains sufficient interest in the subject-matter of the grant to apply to the court of chancery *to restrain such diversion.* The grant of a lot of land to set a meeting-house thereon does not imply a condition. And "an estate upon condition cannot be created by deed, *except where the terms of the grant will admit of no other reasonable interpretation.*"

It is undoubtedly true that the right of the general government to pass its vessels through the canal toll free could have been enforced if it were denied, by an appeal to this court in equity; or, if the State had sought to devote the easement granted to other uses than those to which it was expressly limited, redress could be found in the same forum. But certainly under the authority cited, the absolute estate which had been granted would not be determined or be subject to forfeiture for a breach of what, upon acceptance by the State, amounted to a mere covenant upon its part to permit the vessels of the United States to pass through the canal free of charge.

If such be the situation as to this provision it is difficult to find any basis for an argument that it would be any different in case the State violated the provision relative to the rates of toll generally. If, after the State had been fully reimbursed for its expenses in construction, etc., it had continued to impose tolls in excess of the necessary expenses for the care, charge and repairs of its canal, this certainly would not have been held to work a forfeiture of its title to the canal. The owners of vessels charged excessive rates would have been proper relators in an action to reduce the tolls. The United States itself might have intervened in

a proper proceeding to compel the State to observe the obligations of its covenant arising from the acceptance of the grant and not to exceed the stipulated rate of tolls. Ample redress could have been found through such proceedings without depriving the State of the title to this canal, which, by the solemn act of Congress, had been vested in it *forever*.

In reference to the clause requiring report to the Secretary of the Interior, the right to require such a report to be made could have been easily enforced. To predicate a defeasance upon such a provision would be unprecedented.

These several provisions of the grant are not expressed as "conditions" upon the estate granted, but rather as obligations that the State by its acceptance of the grant was bound to assume and carry out, not at the risk of losing its canal, but at the risk of being compelled by due process of law to perform.

Third. *The acts of both the United States and the State as expressed in legislation, negative the idea that the State's title of the canal was not absolute and indefeasible, and that the United States had an usufructory interest in the tolls or other earnings thereof.*

The counsel for complainant strongly contends that certain statutory declarations of the Legislature of the State of Michigan and reports of its public officers furnish evidence of a convincing character that the State did not consider that it held a beneficial interest in this canal.

But it is just as insistently urged on behalf of the State, that the Acts of Congress passed in reference to this canal, and the course pursued by the officers of the United States, indicates that Congress considered that the title which had been vested in the State by the grant of this right of way was absolute and indefeasible; and that any incidental bene-

fits that might arise, or had arisen, from the operation of the canal,—at least such benefits as did not arise from a breach of the conditions expressed in the grant,—belonged, by right of its ownership of the canal, to the State.

The solemn and especially weighty words of "irrevocable grant" contained in the act in question, and the construction of the conditions that were imposed, have already been considered. But there were later acts that have almost equal significance.

In 1869 by Joint Resolution No. 39 the Legislature of the State of Michigan offered to transfer to the United States "such canal, with all its appurtenances, and all the right and title of the State of Michigan in and to the same," subject to the proviso that the State should be "first guaranteed and secured to the satisfaction of said board of control, against loss, by reason of its liability upon the bonds issued under and by authority of an act, entitled "An act to provide for the repairing, preservation and operation of the ship canal around the Falls of St. Mary's, and to perform the trust respecting the same," approved February fourteenth, eighteen hundred and fifty-nine.

This offer was not acted upon by Congress until 1880, when by the act approved June 14, 1880, the Secretary of War was authorized "to accept on behalf of the United States from the State of Michigan, the St. Mary's canal and the public works thereon: Provided, Such transfer shall be so made as to leave the United States free from any and all debts, claims or liability of any character whatsoever, and said canal after such transfer shall be free for public use."

In neither of these acts is anything said about the transfer of moneys on hand in the State treasury derived from the operation of the canal. Certainly the offer of the State had

no reference to such moneys. The offer was limited to "the canal and its appurtenances." The acceptance was of the "canal and the public works thereon." Neither of the descriptions of property thus employed could be construed to embrace money on hand realized from the operation of these works.

But further, as indicating the evident intent of the parties, the offer made in 1869 was conditioned by the assertion on the part of the State of the fact that it was under certain obligations incurred for the repairing, preservation and operation of the canal, and that it would turn the canal over *only upon condition of its being guaranteed from loss on account of these obligations.* In this it was asserting that the proceeds from the land grant and the tolls from the canal had not yet reimbursed it for its outlay and obligations. The response of the United States did not come until eleven years later, and its reply was that it would not accept the canal and public works thereon unless in its acceptance the United States was to be left *"free from any and all debts, claims or liability of any character whatsoever."*

In other words, in 1869, the State claimed that it was a creditor of this "canal fund" that was to be made up of receipts from the sale of canal lands, canal tolls and earnings, and in which fund the Attorney General of the United States claims the United States then had and still has an equitable interest. But in 1880, Congress, in stating the conditions upon which it would accept the canal and the public works thereon, admits that the State has made the claim that it had not been reimbursed for its expenditures and obligations incurred in respect to the canal; but it refuses to acknowledge the relationship of debtor and creditor as existing between the State and the United States, and refuses to permit it to be created. That this is true cannot

be gainsaid. Congress refused to accept the canal unless the State relinquished any demand for further reimbursement. The canal was to be left *"free from any and all debts, claims, or liabilities of any character whatsoever."* This must have been intended to refer specifically to the claim made by the State in its offer to transfer the canal.

But even though the relationship of debtor and creditor had existed between the State and the United States under the terms of this grant, the balance due in 1869 and in 1880 were unstated. The demand that the State relinquish its claim would imply that in consideration thereof the United States would relinquish its claim.

A settlement of accounts between parties is *prima facie* a settlement of *all* accounts.

Bourke vs. James, 4 Mich. 336.

Or if the transaction be viewed as the substitution of a new contract, regarding the control and management of this canal for the old one made in 1852, the presumption would be that it was intended to discharge the old agreement and all obligations thereunder.

That the State of Michigan took the view that it was not under obligation to pay over to the United States as its creditor the accumulated tolls in its canal fund nor to deliver to it the personal property and paraphernalia that had been used in and about the canal, is made evident by the terms of Act No. 17, Public Acts of 1881, heretofore printed in this brief. In consonance with the offer of the United States to accept the canal and public works thereon free from debt, etc., it ordered their transferance. But in reference to the transferance of the money and material the board

of control was authorized and empowered (not authorized and directed as it was with respect to the canal and public works thereon) to make the transfer to the United States, *at any time the board may deem it proper*, subject however to this proviso or condition, namely, that "such transfer of material and payment of moneys *shall be in consideration of the construction, by the United States of a suitable dry dock to be operated in connection with the Saint Mary's Falls Ship Canal for the use of disabled vessels.*" This is far from an admission that the United States had an absolute right to have, and receive this money and material. In fact it is a substantial denial of such a right, and in the fact that the State imposes a condition, or more properly a consideration, to be forthcoming from the payee who is to receive it, it asserts that chiefest attribute of ownership, namely, the right to determine the consideration upon which money will be parted with.

II.

ADMITTING THE ALLEGATIONS IN COMPLAINANT'S BILL IT DOES NOT APPEAR THAT THE CONDITIONS RELATIVE TO THE USE AND OPERATION OF THE CANAL IMPOSED BY THE ACT OF AUGUST 26, 1852, WERE VIOLATED BY THE STATE.

First. *No breach of conditions upon which a money demand could be predicated is claimed in complainant's bill, except that the State made a profit out of the operation of the canal.*

It is true that a violation of the State's obligation is directly charged in the bill of complaint in the failure of the officers of the State to make report to the Secretary of the Interior as required in section five of the act, but no money demand is made or could be made upon that account. Otherwise, except in one particular, everything had been

satisfactory. The canal had been constructed, presumably on the location or site intended. It was operated without complaint made on the part of the United States. Government vessels in passing through the canal had undoubtedly been accorded free passage. Complaint is made however that the State charged excessive tolls and that this was apparent from the fact that there was on hand in the canal fund of the State when the canal was turned over to the federal government the admitted sum of $68,927.12.

The pleader for the government seeks to excuse the State by saying that the accumulation of this amount "was done without intention on the part of the State to make a profit from the management and control of said canal in violation of the act of Congress above quoted, but for the purpose of having cash on hand to make repairs either during the season when the canal was closed for navigation or any time when so needed."

It would almost seem that the learned assistant to the Attorney General of the United States, whose name appears upon the brief of the government, argues that the State presumptively had violated the terms of its obligation under the grant, if, when its canal was turned over to the United States, there was a single penny in its canal fund. He certainly must be held so to argue if he bases his right to recover upon a breach by the State of the obligations assumed by it upon acceptance of the grant.

The effort to controvert the assertion that the fact of this fund on hand is presumptive of the fact that the State had violated its agreement in respect to the rate of tolls to be charged, is made under the following sub-head:

Second. *A surplus of tolls upon hand to meet possible emergencies is not to be held as a violation of the limitation upon the amount of tolls that could be collected.*

Anyone conversant with the risks attendant upon the maintenance and operation of a great ship canal such as that at Sault Ste. Marie can hardly impute to the State other than reasonable prudence in keeping from $50,000 to $75,000 constantly on hand to meet emergencies.

Mighty forces were to be controlled. A leak in an embankment or a slight impact of a vessel upon the lock gates, a collision or the sinking of a vessel in the canal or locks, would result in tremendous damage; and, without the means of meeting such emergencies, the whole vessel interest engaged in the Lake Superior trade would be tied up indefinitely at a loss hardly to be expressed in ordinary figures. Such events have happened many times, and particularly since the United States took over this canal; and they have been so widely advertised as almost national disasters, due to no lack of human caution and prudence, that it is hardly necessary to call them to the attention of this court to enforce the necessity for the maintenance of a constant reserve by the State while it was charged with the maintenance of these works.

The State by the acceptance of this grant became charged with the duty and obligation of maintaining this canal efficiently and in safe and proper condition. This was the paramount consideration, and all obligations that it assumed were subordinated to this, the greatest of them all. It seems almost absurd to have to argue this proposition. By the necessities of the case the rates of toll would have to be based upon estimates both of probable expenses, and the probable number of vessel passages. At the close of navigation there would have to be money on hand to meet the expenses of repairs, refittings, etc., that had to be made during the winter months. The offer of the State to turn over the canal was made in 1869. The month or day that the United

States might accept was unknown. The claim of the government's counsel is that because, when Congress finally accepted, there was money in the canal fund, Michigan stands convicted of having violated an agreement not to charge tolls so as to make a profit out of this canal. The facts that must be well known to this court and which would occur to anyone reasonably considering the proposition presented, would seem to furnish the most complete refutation of the argument thus advanced.

Third. *A certain portion of the earnings of the canal was not subject to the conditions which related to the rate of toll that could be charged.*

This fact does not appear in complainant's bill and may not be known to its counsel. But in asserting that the sum of $68.927.12 had arisen from the imposition of excessive tolls it is presumed to be pregnant with the assertion that this amount could have arisen from no other source, or at least no other that would not imply a breach of the obligation of the State assumed by the acceptance of this grant.

But there were revenues that accrued to the State in the operation and maintenance of this canal other than tolls for the lockage of vessels. Instances such as the following may be enumerated, permitting vessels to use one of the lock chambers as a dry dock, rent of lighters, pumps, diving apparatus, etc., sale of old material, etc. The total returns for these various sources during the twenty-six years that the State operated this canal form no insignificant amount. They were uses permitted without impairment of the usefulness of the canal as a highway, for which the State was accustomed to charge such amounts as the privileges or services were reasonably worth, and which were duly accounted for and placed in the canal fund. The State was bound by no condition not to render these services or not to permit

the uses of the canal and its apparatus in the manner detailed. It was under no obligation to do or permit these things to be done gratuitously, or at a price not exceeding the cost thereof to the State.

Certainly on the grounds of a "condition broken," the United States is not entitled to such earnings as are here enumerated, and their deduction from the balance in the canal fund would substantially reduce the balance above referred to.

Fourth. *The United States by subsequently taking over and accepting the canal from the State, and particularly in the light of the several acts of offer and acceptance must be held to have waived any claims for a breach of the conditions imposed by the original grant.*

This proposition has been already stated and quite fully discussed, in considering the question of whether Congress in the act of accepting the canal from the State did not concede the indefeasible character of the State's previous title, and its ownership of such incidental benefits as arose from the operation of the canal. Hardly more need be said than that the revesting of title in the grantor would discharge the grantee from liability on account of the conditions with which his estate had been burdened. It would be presumptively an accord and satisfaction as to claims that might have been made for a breach of the conditions that might have operated in impairment of the original grantee's title.

III.

CONCEDING ARGUENDO THAT UPON ACCEPTANCE OF THE GRANT THE STATE BECAME A MERE TRUSTEE AND NOT SEIZED OF AN ESTATE IMPLYING THE VESTING OF A BENEFICIAL INTEREST IN THE GRANTEE.

First. *The United States was not named or intended as cestui que trust.*

Does counsel claim that Congress, when it made the grant of this canal right of way, created or intended to create a trust as to which the United States was the *cestui que trust?*

The State of Michigan, which presumptively would receive an indirect benefit from the construction and operation of the canal that would at least warrant it in accepting the gratuitous office of trustee, was expressly inhibited from making any profit out of its operation; and by the same token it would seem certain that Congress, which did not consider that the United States would receive sufficient benefit from the proposed improvement to itself enter upon it, did not intend to reserve to the United States any ultimate revenue therefrom. This purpose of Congress was made even more manifest, when later it agreed to take over the canal and make it free of tolls and entirely a governmental burden. At no stage was it expected that direct pecuniary benefit would accrue to either State or National governments.

The argument of the assistant to the Attorney General is that because the benefits of this canal accrued to the whole people rather than to those of any particular locality or State, that the United States government is more properly to be held entitled to have this money that has arisen from the administration of this trust, than is the State of Michigan. In other words in the uncertainty that surrounds the question of who actually is the proper *cestui que trust,*

counsel asks this court to declare the office vacant and presents the claims of his client to be nominated to the office, the absurdity of which is apparent when it is considered that the rule is that "if no *cestui que trust* is named, or so designated that he can be identified, the court cannot carry a trust into effect, however clearly it may be created in other respects."

Perry on Trusts, Fourth Edition, Sec. 95.

But let us analyze the claim that the United States comes more nearly to representing the whole of the beneficiaries of the trust than any other governmental organization.

The vessel owners whose boats used the ship canal would be the first to receive the benefits of the reduction of tolls required under the terms of the so called trust. But it is apparent that these owners added the amount of the tolls, whether large or small, to their freight charges and that these charges entered into the price of the commodities that were carried to or came from Lake Superior, and were ultimately paid in all but infinitesimal amounts by the final consumers. The latter, the chief beneficiaries of low tolls or freedom from tolls of this canal, are to be found all over the world. The copper and iron of the Upper Peninsula of Michigan and the wheat of the great northwest of the United States and no less that of Canada, pass through this gateway *into the markets of the world,* and there is no quarter of the globe but can furnish legitimate claimants to being part beneficiaries of this trust. It is hardly conceivable that this court will attempt to measure the number of beneficiaries or the extent of benefit that each of the governmental organizations of the world, might present to this

court in this candidacy for the position of *cestui que trust* which the assistant to the Atttorney General so gravely assumes is now about to take place.

Second. *But whether cestui que trust, or settlor having an interest in the execution of the trust that would entitle it to apply to a court of chancery to compel its proper enforcement the United States acknowledged the due execution of the trust and discharged the trustee by its taking over of the canal and by the declarations contained in the Act of Congress in reference thereto.*

It is apparent from what has been said that the United States cannot be held to have been intended as *cestui que trust* as to any direct pecuniary benefits that might arise from the operation of this canal. But even though not *cestui que trust* it might properly be considered to have had an interest in the execution of the trust as settlor, or founder. But a settler or founder of a trust created by grant, by his own act becomes a stranger to the trust, in the sense that he no longer has an interest in property he has aliened. It is true that, as to a certain class of corporations, the founder has a right of visitation which he may retain or may assign, but the court of chancery has nothing to do with his visitorial power. It is only as respects the administration of the corporate property that the court has any jurisdiction.

Perry on Trusts, Fourth Edition, Sec. 742.

But the United States claims the rights of a *cestui que trust,* although it was also the settlor or the creator of the trust; and the point is here made that the joint act of the *cestui que trust* the trustee and the settlor must certainly be

held to have effected a recission of the trust and a discharge of the trustee. Perry on Trusts says, "A trustee may be relieved from his office by the consent of all parties interested, without the decree of a court, even if the instrument of trust is silent upon that subject. But the transaction operates rather as an estoppel of the *cestui que trust* than as an affirmative transfer of power."

Ibid. Sec. 285.

But it is further stated, that "A conveyance by the trustee to the *cestui que trust* merges the title and determines the trust."

Ibid. Sec. 921.

The answer to this will no doubt be that although the conveyance of the canal and the public works thereon to the United States did relieve the State from the obligation of future care and maintenance, that the trust attached to the money that had been previously realized from the canal and the tools and materials on hand, and that the conveyance of the real estate would not divest the trust that had attached to this personal property.

The answer to that proposition is the one that has been previously made in controverting the claim that the relation of debtor and creditor existed as respect canal tolls or profits.

It makes no difference whether the State was debtor or trustee. By the grant it was given the right to reimburse itself for the cost of the canal and the expenses of its main-

tenance, operation and repair, and until it was so reimbursed the terms of the trust that required tolls to be kept equal to expenses did not become operative. When the State offered to turn the canal over in 1869 it asserted that it was a creditor to the canal fund and it attached as a condition of its relinquishment of the trust that it must be fully reimbursed for its expenses as trustee. The United States refused to accept the property burdened with any charges incident to the performance of the trust, and the State assented. This is the true intent of the several acts already referred to and must be accepted as a settlement of all claims that grew out of the administration and discharge of the trust.

No claim of mistake or fraud can be put forth that gives this court jurisdiction to reopen the account. Congress has made no declaration of dissatisfaction, and has passed no act imputing mistake or fraud in arriving at the agreement that must be presumed to have been intended to be consummated when this canal was turned over. It stands to all intents and purposes as *res adjudicata;* and is not subject to be reopened at the will of one of the ministerial officers of the United States.

Third. *The declarations of the legislature and officers of the State of Michigan did not create a trust, and certainly not one in which the United States would have a beneficial interest as cestui que trust.*

It is stated in the sixth paragraph of complainant's bill of complaint and quite persistently argued in complainant's brief, that even though the grant of the canal right of way was intended by Congress to be a donation to accomplish a public work for the general good of certain classes of people, and although it was in a certain sense absolute, yet, that the declarations of the Legislature of the State of Mich-

igan and certain officers thereof, particularly the State Treasurer, amounted to an acknowledgment of, or possibly even the actual creation of, a trust in favor of the United States.

We have already conceded, *arguendo*, that the State was, as respects this public work, a mere trustee entitled to have from the administration of the trust only reimbursement for the cost of administration, and have attempted to enforce the conclusion that no liability exists to respond to the money demand that has been made on behalf of the United States. It may seem to the court that counsel now takes a backward step in his argument, to here deny the fact of a trust. But while the order of treatment may not be entirely logical, this brief would not be complete unless the exact claim of the State is clearly indicated, and an explanation made of the several declarations referred to in complainant's bill of complaint.

The first reference is to the third paragraph of the preamble of Act No. 175, Laws of Michigan, 1859, wherein the following language is used:

> "Whereas such canal, having been built and accepted by the authorities of this State, is found to need repairs in order to its preservation and usefulness, *and the due performance of the trust* created by said Act of Congress and the assent of this State thereto," etc.

The second reference is to the report of the State Treasurer for the year 1883 in which he uses the following language:

> "Since my last report, the remainder of the personal property belonging to the St. Mary's Falls ship canal has been sold, making a final balance in that fund of $68,927.12. All business pertaining to the manage-

ment of the canal on the part of the State has ceased and the moneys in the fund remain in the State treasury under Act No. 17, Laws 1881, *the State acting simply as trustee.*"

The recital in Act No. 175, Laws of 1859, cannot be construed to in any wise change the legal relations created by the previous acts of Congress and the Legislature of Michigan. The recital no doubt referred to the obligations that the State had assumed and the promises that it had covenanted to perform in respect to its management and control of the canal.

The concession of the State Treasurer has even less significance. He expressly refers to Act No. 17, Laws 1881, in which the State in effect denies that the United States was *cestui que trust* as to the moneys referred to, but possibly does admit a certain sort of trust in favor of the vessel interests, at least it offers to pay the money over to the United States in consideration of the construction of a dry dock by the United States to be operated in connection with the ship canal for the use of disabled vessels. The State Treasurer is pleased to speak of the money held under these conditions as held by the State as "trustee."

It is submitted that none of these declarations in anywise change or modify the actual relations that existed by reason of the grant in question and its acceptance by the State. These acts speak for themselves and cannot be held to have been modified except by equally authoritative declarations intended to effect their modification.

IV.

THE GRANT OF THE CANAL RIGHT OF WAY CANNOT BE CONSTRUED AS A MIXED TRUST AND POWER.

Counsel for defendant is bound to concede that a certain degree of plausibility attaches to the contention of counsel for complainant that the grant of the canal right of way with attendant conditions is to be construed as a grant of property connected with the exercise of political power for public purposes, or "to accomplish a public work for the general good of all classes of people engaged or interested in the commerce of the Great Lakes of the United States" as it is expressed in complainant's bill of complaint; but the fallacy of the claim can be readily made apparent.

The right of a State legislature to create subordinate municipalities and to endow them with property or with the right to acquire property *to carry out the purposes of government* is undoubted, unless there are constitutional restrictions abridging the right; and with the right to create is also coupled the implied right to dissolve.

Dillon on Municipal Corporations uses the following language:

> "As to private corporations it can, we think, safely be affirmed that while the legislature may, under and pursuant to such reserved power, annul and dissolve them at pleasure, it is not within its competency, under the Federal Constitution as amended, or under like provisions of the constitutions of the States, to impair or affect the property or property rights of the dissolved corporation, but only *its right to exist*, and such other rights as are *directly and necessarily*

dependent on the continued existence of the corporation. The rights of mortgagees, of creditors generally, and rights acquired under valid contracts with the corporation, survive the repeal and dissolution. *And the same doctrine, doubtless, applies to property rights acquired by virtue of valid municipal grants.* * * * It is believed by the author, for the reasons suggested in this chapter, that while the legislature has full power of legitimate regulation and control, it cannot deprive them (that is, in essence, *the people* of the locality at whose expense it has been acquired or for whose benefit it was granted) of such property."

This quotation is made not so much to sustain the contention of this brief as to illustrate the theory of complainant. The latter apparently seeks to have applied to this case the rule that a governmental agency that may create subordinate or minor municipalities and bestow upon them a power to perform governmental functions, retains a beneficial interest in the exercise of the power granted, and that when the grant is one of property coupled with a power to use the property only to accomplish a public work or perform a governmental function, the grantee has no beneficial interest in the estate conveyed although the conveyance may be absolute in form. That this rule is applicable in the relationship between a State and its minor municipalities may be admitted, although the quotation above made would seem to imply a limitation upon the authority of the State upon dissolution of the municipality to take to itself all of the property or moneys acquired by the municipality in the performance of the grant that it has on hand at the time of its dissolution or the revocation of the grant.

But would the same implications arise in the relationship

to be found between independent governmental organizations having equal authority and no interdependency?

One individual may donate to another individual property to assist the latter in carrying out some purpose beneficial to himself alone and no relationship of trust or power will be implied from the grant.

The State of Michigan is a governmental organization of as high authority as is the United States itself. In many instances the powers of State and Nation are concurrent, but in most particulars each has distinctive powers and duties created and imposed by constitutional provisions, and such powers cannot be delegated one to the other.

The State of Michigan had full right and authority to construct this ship canal around the rapids of the St. Mary's River to accomplish a public work that would inure to the general good of all classes of people engaged or interested in the commerce of the Great Lakes, had it seen fit to exercise the right. Such a right inheres in its sovereignty. It needed no enabling act of Congress to give it the necessary power or authority, nor could such enabling act have given it such authority did it not already possess it.

The construction of canals that were designed in a large measure to serve public necessity and to inure to general rather than mere local welfare had up to 1852 been much more commonly done under State than under federal authority and ownership. The Erie canal of New York and many others might be enumerated. It was the exception that the United States undertook works of internal improvement. Its constitutional authority to engage therein had been very insistently disputed, and its policy had been rather to aid the States in carrying out their canal projects by land grants, than to itself assume the burdens incident to federal ownership and control. It was not until after the civil

war that a river and harbor bill so called was first passed by Congress and approved by the President, and thus a change of policy with respect to this class of internal improvements entered upon by the United States.

All these considerations demonstrate that in the grant of the canal right of way no *power* was intended to be vested in the State. The *power already existed*, and the construction of the canal was and was intended to be the exercise of the power of the State to carry out *its own* public purposes.

With this view of the case how can it be reasonably said that the rule as to the grant of property to minor municipalities to enable them to carry out the governmental functions for the granting political organization can be said to apply.

The benefits that may be derived from the exercise of public functions undoubtedly may be said to belong to the governmental organization from which the powers to be exercised primarily originate.

In the case at bar the grant of property must be taken to have been what it is stated in the title of the act to have been, viz: "a donation," and the limitations contained in the grant must be construed, not as the limitations of a "power," but as an effort to insure that *the State's purposes and designs* in respect to this improvement and its future control and operation, purposes which were agreeable to and were acquiesced in by the United States to the extent that it was willing to aid the State in carrying them out, should not be departed from.

It is here argued that, inasmuch as the power to construct this canal and devote it to public purposes existed in the State, and did not arise from any grant of power by the United States and inasmuch as the grant of property by the

United States is in form absolute and is declared to be "a donation," it follows conclusively that any incidental pecuniary benefit that might have arisen from the operation of this canal would be the exclusive and absolute property of the State, and certainly could not be legally or equitably claimed as belonging to the United States.

V.

BUT IF CONGRESS, ON THE TERMINATION OF THE SO CALLED GOVERNMENTAL AGENCY OR MIXED TRUST AND POWER, COULD HAVE MADE A CLAIM OF RIGHT TO HAVE THE SURPLUS TOLLS ACCUMULATED BY THE STATE IN CARRYING OUT SUCH AGENCY, TURNED OVER TO ITSELF, YET NOTHING SHORT OF A DECLARATORY ACT TO THAT EFFECT WOULD CREATE THE RIGHT ON THE PART OF THE DEPARTMENT OF JUSTICE TO MAKE THIS DEMAND UPON THE STATE.

It is not proposed to argue but merely to state the above proposition. The department of justice cannot create but is merely empowered to prosecute claims due to the government. No declaration has been made by Congress of a right to have these surplus moneys. Upon the repeal of a municipal charter, provision is usually made for the disposition of funds upon hand in the municipal treasury, and the State would be presumed to assert its right to have any of these moneys properly belonging to it. In this case by the concurrent acts of the State and National governments the power granted by the latter to the former (if the court finds it to have been a case of power granted) was revoked. If the United States had a legitimate right to the surplus moneys realized by the State in the exercise of this power, presumably Congress would have laid claim to it; and unless Congress has so declared it is contended that no claim can be said to exist.

VI.

THE CLAIM OF RIGHT TO HAVE AN ACCOUNTING AS TO THE SALE BY THE STATE OF THE LANDS GRANTED TO AID IN THE CONSTRUCTION OF THE CANAL.

Thus far has been considered only that part of the grant relating to the canal right of way.

It may and undoubtedly will be contended that, irrespective of the view this court may take of the right of the United States to have and receive from the State the surplus tolls admitted to have been on hand when the canal was turned over to the latter, that the failure of the State to furnish a statement of the sales of these lands granted to aid in the construction of the canal, makes an accounting under this bill inevitable.

In reference to this, defendant will call attention to one feature of complainant's bill. In the first paragraph of the bill, Act No. 38, Laws of Michigan, 1853, is set out in full, and it is apparent from such act that the legislature authorized a contract to be made for the construction of the canal in consideration of the State's vesting in the contractors the entire grant. This may only inferentially appear from this act, but that such was the course actually pursued may be stated, if it will not be deemed to be going outside the record.

But irrespective of this, the act of the legislature of 1869, in which the State offered to turn over the canal to the United States if the latter would fully reimburse it for expenses that it had been to in respect to such canal and for which it had not been fully reimbursed by the sale of lands, receipts from tolls, etc.; and the declaration of Congress in 1880 that the United States would accept the canal if the State made no further claims for reimbursement and

the canal was debt free; in the absence of fraud, duress or mistake, must be accepted as a settlement of any claim that might have been made by or on behalf of the United States in regard to the sales or disposition of these lands.

What has been already said in the discussion of the effect of these two acts as a settlement of claims that may be considered as having grown out of this grant of right of way and grant of lands to aid in the construction of this canal, applies to the proceeds from land sales more certainly than to any other feature of the account.

VII.

THE IMPUTATION OF BAD FAITH TO THE STATE OF MICHIGAN.

The *mala fide* necessarily charged against the State of Michigan in the bill of complaint that has been filed against it in this court is the diversion of these so called trust moneys from the purposes for which it is claimed they were held and the refusal of its officers to acceed to the demands of a putative *cestui que trust*.

If the arguments that have been advanced in this brief are sound, the only act of the State authorities of which complaint can really be made is the withdrawal of the State's offer to devote this money to the purpose of recompensing the United States for the construction of a dry dock in connection with the government locks at Sault Ste. Marie, Michigan, for the use of disabled vessels, or the failure of the State to devote it to some use that would be beneficial to the interests from which it was primarily collected.

No claim will be made that the United States has earned the money by compliance with the State's offer. Nor can the officers of the federal government be permitted to complaint if the State sees fit to do what it chooses with its own.

In the brief filed on behalf of complainant but one case is cited to support the government's contention, and that has been already referred to, viz.: Rice vs. Railroad Company, 1 Black. 358. If that case is authority for anything it is to the effect that the United States can revoke a grant once made, if revoked before a beneficial interest has vested in the grantee. With the authority of this case as the petard with which to silence this last complaint against the State of Michigan, it may be said that it was just as competent and proper for the State to withdraw its offer to pay over this money to the United States for uses beneficial to the marine interests of the Great Lakes, as it was for the United States to withdraw its land grant from the Territory of Minnesota. Bad faith is not to be charged in either instance.

In the light of the arguments advanced in behalf of defendant it is insisted that it is entitled to an order of this court sustaining defendant's demurrer and dismissing complainant's bill of complaint.

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